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Sivadevi a/p Sivalingam v CIMB Bank Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(A)-59–01 OF 2017
ABANG ISKANDAR, MARY LIM AND SURAYA OTHMAN JJCA
17 APRIL 2018

C

Civil Procedure — Proceedings — Foreclosure proceedings — Order for sale by court — Whether foreclosure proceedings time-barred — Commencement of limitation period — Whether limitation laws applied — Computation of limitation period — Rules of Court 2012 O 83 — Limitation Act 1953 s 21

D

The respondent offered the appellant a loan for the sum of RM185,320. A third-party charge was presented and lodged against the first title of a property. A loan agreement was subsequently entered into between the parties. The appellant defaulted in the repayments and the respondent entered a default judgment ('JID') against the former. By consent, the JID was set aside. Instead, the respondent foreclosed the property and sought an order for sale of the same. The appellant: (a) challenged the foreclosure proceedings on the ground that the proceedings were bad in law as it was initiated more than 12 years after the right to foreclose arose; and (b) pleaded limitation of action under s 21 of the Limitation Act 1953 ('the Act'). The High Court ordered an order for sale under s 267 of the National Land Code ('the NLC'). Hence the present appeal. The sole issue that arose was whether the foreclosure proceedings or proceedings for an order for sale taken by the respondent was time-barred.

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Held, allowing the appeal with costs:

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(1) The facts in the present appeal did not concern a recovery of the principal sum of money which was secured by a charge or even an action to recover proceeds of land or even the balance sum after a sale. It was an action to enforce a charge of land with the purpose of receiving which had accrued. Such an action fell quite clearly within the terms of s 21(1) of the Act (see para 51).

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(2) In order to enforce a charge, two steps were mandatory; compliance with the requirements of s 216 of the NLC and O 83 of the Rules of Court 2012 ('the ROC'). Compliance of the requirements are strict. An order for sale would not be allowed where there is no compliance of O 83 r 3(3) and (6) of the ROC. However, it could not be denied that without attending to the notice requirements specified under s 256 of the NLC, there could not be any proceedings or action under O 83 of the ROC (see paras 53–54).

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(3) The terms of the charge presentation were consistent with the terms secured under s 254 of the NLC. The event in default was the breach which occurred on 12 May 2003 when the appellant failed to service the repayments. The law of limition set in on 12 May 2015. The bank filed this action on 8 August 2016. The action was clearly barred under s 21(1) of the Act (see para 71).

(4) The fact that s 256(2) of the NLC expressly provides that the application for sale would be dealt with in accordance with the provisions of any law relating to civil procedure for the sale of land, which was for the time being in force, and O 83 is that specific procedural law for the purpose of charges, foreclosures and for sale of land, does not alter the status of s 256 as procedural law in effect. This provision merely provided for the manner and the authority which had been vested with the power to make that order for sale (see para 80).

[Bahasa Malaysia summary

Responden menawarkan perayu pinjaman sebanyak RM185,320. Caj pihak ketiga dikemukakan dan dimasukkan terhadap hak milik satu hartanah. Perjanjian pinjaman kemudian dimeterai antara pihak-pihak. Perayu ingkar dalam bayaran balik dan responden memasuki penghakiman ingkar ('JID') terhadap perayu. Atas persetujuan, JID diketepikan. Sebaliknya responden menyita hartanah tersebut dan memohon jualannya. Perayu telah: (a) mencabar prosiding penyitaan dengan alasan prosiding ini tidak sah bawah undang-undang kerana dimulakan lebih dari 12 tahun selepas hak untuk menyita timbul; dan (b) memplidkan had masa tindakan di bawah s 21 Akta Had Masa 1953 ('Akta'). Mahkamah Tinggi memerintahkan perintah penjualan di bawah s 267 Kanun Tanah Negara ('KTN'). Oleh itu, rayuan ini. Isu tunggal yang timbul adalah sama ada prosiding perampasan atau prosiding bagi perintah jualan yang diambil oleh responden dihadkan oleh had masa.

Diputuskan, membenarkan rayuan dengan kos:

(1) Fakta dalam rayuan ini bukan melibatkan pemerolehan wang pokok yang telah dijamin dengan caj atau tindakan untuk mendapatkan hasil tanah atau jumlah baki selepas jualan. Ia adalah satu tindakan untuk menguatkuasakan pajakan tanah dengan maksud penerimaan yang telah terakru. Tindakan sedemikian jelas terjumlah di bawah s 21(1) Akta (lihat perenggan 51).

(2) Untuk menguatkuasakan pajakan, dua langkah adalah mandatori; pematuhan terhadap keperluan s 216 dari KTN dan A 83 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Pematuhan terhadap keperluan-keperluan ini adalah ketat. Perintah jualan tidak akan dibenarkan jika tidak ada pematuhan A 83 k 3(3) dan (6) KKM. Walau bagaimanapun, tidak dapat dinafikan bahawa tanpa merujuk pada

keperluan notis yang dinyatakan di bawah s 256 KTN, tidak ada apa-apa prosiding atau tindakan bawah A 83 KKM (lihat perenggan 53–54).

(3) Syarat pengemukaan pajakan adalah selaras dengan terma-terma yang dijamin di bawah s 254 KTN. Keingkaran adalah pelanggaran yang berlaku pada 12 Mei 2003 apabila perayu gagal membayar balik bayaran tersebut. Undang-undang had masa terpakai pada 12 Mei 2015. Bank memfailkan tindakan ini pada 8 Ogos 2016. Tindakan tersebut jelas dihadkan oleh had masa di bawah s 21(1) Akta (lihat perenggan 71).

(4) Fakta bahawa s 256(2) KTN secara nyata memperuntukkan bahawa permohonan untuk jualan akan diuruskan selaras dengan peruntukan mana-mana undang-undang berhubung prosedur sivil bagi jualan tanah, yang pada masa ini sedang berkuatkuasa, dan A 83 adalah undang-undang prosedur khusus bagi tujuan bayaran, penyitaan dan jualan tanah, tidak mengubah status s 256 sebagai undang-undang prosedur yang berkuat kuasa. Peruntukan ini hanya memperuntukkan cara dan pihak berkuasa yang diberi kuasa membuat perintah jualan (lihat perenggan 80).]

Notes

For a case on foreclosure proceedings, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) para 8227.

Cases referred to

Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd [1993] 1 MLJ 283, HC (refd)

Bank Bumiputera Malaysia Bhd v Doric Development Sdn Bhd & 2 Ors [1988] 1 MLJ 462 (refd)

Chan Boi Loi v Public Bank Bhd and another application [2011] 1 MLJ 478; [2009] 6 CLJ 81, FC (refd)

CIMB Investment Bank Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd [2014] 6 MLJ 779; [2014] 9 CLJ 1012, FC (refd)

Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608, HC (refd)

Consolidated Agencies Ltd v Bertram Ltd [1965] AC 470, PC (refd)

Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409; [1991] 2 CLJ 871, SC (refd)

Eng Ah Mooi & Ors v Overseas Chinese Banking Corporation Ltd [1983] 1 MLJ 209, FC (refd)

Good v Parry [1963] 2 All ER 59, CA (refd)

Hussain v Chanda Singh [1935] 1 MLJ 262, CA (refd)

Jacob v Overseas Banking Corporation Ipoh [1974] 2 MLJ 161, FC (refd)

Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and another appeal [2013] 3 MLJ 61, CA (not folld)

John Edgar Jones v PLSKR Palaniappa Chetty [1935] MLJ 175 (refd)

Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119, SC (refd)
Lim Kean v Choo Koon [1970] 1 MLJ 158 (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, SC (refd)
Lum Choon Realty v Perwira Habib Bank Malaysia Bhd [2003] 4 MLJ 409, CA (refd)
Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266, FC (folld)
Maimunah bte Megat Montak v Mayban Finance Bhd [1996] 2 MLJ 422, SC (refd)
Malayan Banking Berhad v Zahari bin Ahmad [1988] 2 MLJ 135 (refd)
Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd [1988] 1 MLJ 257, SC (refd)
McHenry McDermott v Boyd, Re [1894] 8 Ch 290, CA (refd)
Nasri v Mesah [1971] 1 MLJ 32, FC (refd)
Peh Lai Huat v MBf Finance Bhd [2011] 3 MLJ 470, CA (not folld)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)
S & M Jewellery Trading Sdn Bhd v Fui Lian-Kwong Hing Sdn Bhd [2015] 5 MLJ 717, FC (refd)
Sia Kim Yoke v PP [1998] 5 MLJ 658, HC (refd)
Tan Kong Min v Malaysian Nasional Insurance Sdn Bhd [2006] 1 MLJ 601; [2005] 3 CLJ 825, FC (refd)
Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and anor suit [2011] MLJU 925; [2012] 3 CLJ 249, HC (refd)
Tenaga Nasional Bhd v Kamarstone Sdn Bhd [2014] 2 MLJ 749; [2014] 1 CLJ 207, FC (refd)
Wee Tiang Teng v Ong Chong Hooi & Anor [1978] 2 MLJ 54, FC (refd)
Wong Kok Leong & Anor v RHB Bank Berhad [2015] 2 MLJ 385, FC (distd)
WTK Holdings Bhd v Foo Sae Heng & Anor [2011] 5 CLJ 437, CA (refd)

Legislation referred to

Central Bank of Malaysia Act 2009 ss 56, 57
Courts of Judicature Act 1964 s 17(1)
Limitation Act 1953 ss 2, 6, 6(1)(a), (5), 21, 21(1), (2), (4), 26, 27, Form 16D
Rules of Court 2012 O 83, O 83 r 3(3), (6)
National Land Code ss 243, 249, 249(1)(a), 250, 251, 253, 254, 255, 256, 256(2), (3), 260, 265(3), 281, 331

Appeal from: Originating Summons No JA-24FC-1192–08 of 2016 (High Court, Johor Bahru)

Yap Che Kai (KS Pang & Co) for the appellant.
Vasanthi a/p Vadiveoo (Nurhamizah Abdul Rahman with her) (Syed Alwi Ng & Co) for the respondent.

Mary Lim JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal arises from an order for sale ordered by the High Court under s 256 of the National Land Code granted by the High Court in Johor Bahru on 29 November 2016 in respect of the appellant's property held under Hakmilik Geran 308417, Lot 47137, Mukim Tebrau, Daerah Johor Bahru, Negeri Johor ('subject property'). The sole issue before us was whether the 'foreclosure proceedings' or proceedings for an order for sale taken by the respondent was time-barred.

[2] At the hearing of this appeal, we had invited learned counsel to address us on whether s 256 of the National Land Code is substantive or procedural law, taking the preliminary view that this would be relevant to the larger question of whether the 'foreclosure proceedings' were time-barred. If the proceedings were barred under the laws of limitation, there would be shown a cause to the contrary that the order for sale should not be made.

[3] Upon full consideration of the written and oral submissions of the parties, we allow the appeal on that sole issue. It is our unanimous view that the 'foreclosure proceedings' or proceedings for an order of judicial sale are barred by s 21 of the Limitation Act 1953 in which case cause to the contrary has indeed been properly and successfully shown by the appellant. The appeal is therefore allowed and the decision of the learned judge is set aside with costs. These are our reasons in full.

MATERIAL BACKGROUND FACTS

[4] By letter of offer dated 12 October 1999, the respondent offered the appellant a loan known as Homeexpress loan for the sum of RM185,320. A third party charge was presented and lodged against the title first on 28 December 2009 and later on 8 December 2014 (and not 18 January 2000) — see pp 135–168 of the record of appeal *Jld* 2. A loan agreement was subsequently entered into between the parties on 18 January 2000.

[5] The appellant defaulted in the repayments with the last payment received by the respondent on 12 May 2003 — see pp 126–131 of the record of appeal *Jld* 2, in particular p 126.

[6] On 20 November 2007, the respondent entered a default judgment against the appellant vide Civil Suit No MT4–22–659 of 2007 filed at the High Court at Johor Bahru. By consent, that default judgment was set aside on 9 January 2012. The suit was also subsequently withdrawn with liberty to file

afresh. No fresh writ was filed. Instead, vide originating summons filed on 8 August 2016, the respondent 'foreclosed' on the subject property. The respondent sought an order for sale of the subject property under ss 256 and 257 of the National Land Code read together with O 83 of the Rules of Court 2012, claiming that the appellant was in default of payments with an outstanding sum of RM584,176.46. As mentioned, the last payment was on 12 May 2003.

[7] The appellant challenged the 'foreclosure proceedings', inter alia, on the ground that the proceedings were bad in law because it was initiated more than 12 years after the right to 'foreclose' arose. The appellant pleaded limitation of action under s 21 of the Limitation Act 1953. According to the appellant, the right to 'foreclose' arose upon the default in repayments by the appellant. Since the last repayment was on 12 May 2003, limitation set in on 12 May 2015. The 'foreclosure proceedings' filed on 8 August 2016 was therefore clearly, time-barred under s 21 of the Limitation Act 1953.

[8] At para 6 of the grounds of decision, the learned judge explained that at the hearing of the originating summons, the appellant chose to rely only on the issue of inconsistency in the amounts said to be still outstanding. Hence, the issue of limitation was not dealt with. Before us, the parties agreed that the central issue of limitation remains available for consideration and we agree, it being an issue of law.

DECISION OF THIS COURT

[9] An order for sale will not be ordered where the chargor is able to show cause to the contrary under s 256(3) of the National Land Code. In *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, the Federal Court explained how applications under s 256 of the National Land Code are to be treated:

> A judge hearing an application under s 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.
>
> In this last respect, if he is satisfied, on a careful and an objective assessment of the factual material made available to him, that the chargor has shown cause to the contrary in the sense we have discussed earlier in this judgment, he will refuse and order for sale. On the other hand, if he finds as a matter of law that the allegations raised by the chargor do not constitute cause to the contrary he will merely say so, giving his reasons, and grant the chargee's application.
>
> On no account should he express any view on the merits of any or all of the points taken by the chargor, save to say whether, having regard to the three narrow

> categories we have laid down in this judgment and the relevant authorities upon each category, cause to the contrary has been established to his satisfaction. This is because, for reasons which will appear in a moment, any view expressed by a judge on the general merits of the points taken by the chargor will be purely academic.
>
> Although each case turns upon its own facts ...
>
> We have said that s 256(3) must be read narrowly. It does not, however, follow from this that the chargor who is unable to satisfy the court of cause to the contrary is left without any remedy whatsoever, allegations that fail to amount to cause to the contrary may, as observed earlier, nevertheless form the basis of an action in personam against the chargee.

[10] From the affidavits filed and the submissions made, the appellant argues that he has successfully shown cause to the contrary when he is able to show that the proceedings taken under O 83 of the Rules of Court 2012 are barred under s 21 of the Limitation Act 1953. Since the default which gave rise to the right to 'foreclose' was the default in the repayment of the loan agreement, the computation of the 12 years limitation allowed under s 21 of the Limitation Act 1953 must necessarily commence from the date of the last payment. That date is 12 May 2003 in which case, limitation set in 12 years from that date, which is on 12 May 2015. The 'foreclosure proceedings' initiated on 8 August 2016 is consequently, barred.

[11] The respondent disputes this interpretation arguing that the 12 years limitation under s 21 of the Limitation Act 1953 runs from the date the Form 16D notice which is issued under s 256 of the National Land Code is served on the appellant. Since the appellant was served on 29 January 2016, the 12 years period is computed from this date in which case the proceedings are not time-barred. Alternatively, the respondent argued that there was fresh admission or acknowledgment of the debt vide a letter written by Thamil Selven a/l Savarimuthu on 13 July 2010. Time would then run from 13 July 2010.

[12] In support of their submissions, the respondent relied on the decisions of the Court of Appeal in *Peh Lai Huat v MBf Finance Bhd* [2011] 3 MLJ 470 and *Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and another appeal* [2013] 3 MLJ 61.

[13] In *Peh Lai Huat,* the Court of Appeal was invited to consider whether the respondent's application for an order for sale was barred by limitation. The respondent's predecessor in title had lent the appellant a sum of RM300,000. The loan was secured by a charge over the appellant's land. The appellant defaulted in his repayments with the last payment made on 28 January 1986. On 17 August 2000, the respondent issued a Form 16D Notice demanding payment on the loan together with interest. There was no payment. The

respondent applied for a sale of the land. It was opposed by the appellant on the ground that the proceedings were time-barred. The High Court ruled against the appellant. That decision was upheld on appeal.

[14] The Court of Appeal found that the appellant had overlooked the fact that the proceedings before the High Court was not a claim to recover a debt due. The true nature of the claim was as described by Seah SCJ in *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257 as an 'exercise of their statutory remedy ... under the National Land Code' Consequently, the Court of Appeal concluded that s 21(1) and (2) had no application in the case. In the view of the Court of Appeal, 'the cause of action, which is the right to exercise the statutory remedy of an order for sale did not arise until after the appellant had failed to remedy the default specified in the Form 16 Notice'.

[15] In *Jigarlal,* the appellant had defaulted in the repayment of loans provided by the respondent bank. The bank's letters of demand for payment of outstanding sums proved unsuccessful. The bank then issued two Form 16D Notices under s 256 of the National Land Code. The appellant failed to remedy the breaches and the bank commenced proceedings in court for an order for sale. One of the arguments raised was the 15 years delay calculated from the act of default.

[16] On this issue, the Court of Appeal in *Jigarlal* following the decision in *Peh Lai Huat,* disagreed with the appellant and found that the cause of action by a chargor does not accrue from the date of default of repayment of the loan but from when the chargor fails to remedy the default specified in the Form 16D Notice. The Court of Appeal further held that the cause of action accrued upon the expiry of the 30-day notice specified in the Form 16D Notice; and that the applicable period of limitation was 12 years under s 21(1) of the Limitation Act 1953. We were urged to follow these two earlier decisions.

[17] Having examined very carefully and anxiously the various legislation at play and the numerous case authorities, with the greatest respect, we were compelled to decline.

[18] From the extensive oral and written submissions made, it may be safely concluded that both parties agree that s 21 of the Limitation Act 1953 applies. The question now is the commencement date of that 12 years period; is it from the date of default in repayment or is it from the date of service of the Form 16D Notice. It is our view that when s 21 is carefully examined, and examined together with s 256 of the National Land Code and O 83 of the Rules of Court 2012, it will become readily apparent that the 12 years period

commences from the date when the right to receive the money accrued. Where and when such a right accrues, action or proceeding is then brought to enforce the charge in question. The enforcement of the charge is necessarily by an order of sale. In the case of a registry title, the order is made by the High Court under s 256 of the National Land Code, whereas in the case of a land office title, the order for sale is made by the land administrator under s 260. In the latter, the sale may be ordered by the High Court under s 265(3).

[19] Section 21 of the Limitation Act 1953 reads as follows:

Time bar pursuant to s 21(2) of the Limitation Act

21 Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of sale of land

(1) *No action shall be brought* to recover any principal sum of money secured by a mortgage or other charge of land or personal property or *to enforce such mortgage or charge,* or to recover proceeds of the sale of land or personal property *after the expiration of twelve years from the date when the right to receive the money accrued.*

(2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twelve years from the date on which the right to foreclose accrued:

Provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his possession discontinued.

(3) The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on the property subject to the mortgage or charge shall not be deemed to accrue so long as that property comprises any future interests or any life insurance policy which has not matured or been determined.

(4) Nothing in the preceding subsections of this section shall apply to a foreclosure action in respect of mortgaged land but the provisions of this Act relating to actions to recover land shall apply to such an action.

(5) No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears shall be brought after the expiration of six years form the date on which the interest became due:

Provided that —

(a) where a prior mortgagee or other incumbrancer has been in possession of the property mortgaged or charged, and an action is brought within one year of the discontinuance of such possession by the subsequent incumbrancer, he may recover by that action all the

arrears of interest which fell due during the period of possession by the prior incumbrancer or damages in respect thereof, notwithstanding that the period exceeded six years;

(b) where the property subject to the mortgage or charge comprises any future interest or life insurance policy and it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge, interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued.

(6) This section shall not apply to any mortgage or charge of a ship. (Emphasis added.)

[20] There are several observations that we must make of s 21. First, it uses distinct and particular terms, some of which are defined in the Act itself. Where the terms are defined by the Act itself, those definitions apply to and guide in the interpretation and application of the particular provision under discussion. The terms which are defined in s 2 of the Limitation Act 1953 and relevant for the purpose of s 21 are the following terms:

'action' includes a suit or any other proceeding in a Court of law;

'personal estate and personal property' do not include land or chattels real;

'land' includes things attached to the earth or permanently fastened to anything attached to the earth, rent charges and any legal or equitable estate or interest in land including an interest in the proceeds of sale of land held upon trust for sale but save as aforesaid does not include any right of way, easement, servitude, profits over or in respect of land, or right in the nature of an easement, servitude or profit over or in respect of land, or any other corporeal hereditament.

[21] The terms 'mortgage' (including mortgagee and mortgaged) and 'charge' are however, not defined under the Limitation Act. We appreciate that in *Peh Lai Huat v MBf Finance Bhd*, the Court of Appeal noted that 's 21 speaks of a 'mortgage', which is a type of security that the Code does not recognise. However, in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266, the former Federal Court speaking through Salleh Abas CJ (Malaya) held that: 'when s 21(1) of our Limitation Act speaks of a 'mortgage', it must mean a 'charge' as understood and provided for in Part Sixteen of our National Land Code'. It is precisely for that reason that s 21 is the relevant and applicable law'.

[22] Learned counsel for the respondent has urged this court to take the position that the land jurisprudence in this country does recognise mortgages but not in the English sense as understood under the English land jurisprudence. In Malaysia, mortgages are charges because that is the only

charge recognised — see *Malayan Banking Berhad v Zahari bin Ahmad* [1988] 2 MLJ 135.

[23] We have examined the Federal Court decision in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 and have found that the remarks and findings of the Federal Court must be understood as being applicable to its peculiar facts. While the National Land Code may not recognise a mortgage as a security in that there are no provisions dealing with mortgage, it cannot be ignored that not only are the two terms distinct and different, the use of the two terms in the same provision of s 21 is deliberate by Parliament. At the time the Limitation Act was enacted in 1953, the National Land Code had yet to come into existence; the applicable land law were the respective Land Codes of the Federated Malay States and of the Straits Settlements.

[24] In fact, in an early decision of *John Edgar Jones v PLSKR Palaniappa Chetty* [1935] MLJ 175, Thomas CJ had recognised the difference between a charge from a mortgage:

> Now, a charge under the Land Code bears certain superficial resemblances to a mortgage in England in that it contains a promise to pay and makes the land a security for the debt, but there are essential differences. Whereas in England the estate is transferred to the mortgagee leaving the mortgagor a bare equity of redemption, under the Land Code the estate remains in the chargor who is regarded as the proprietor.

[25] The difference between the two is succinctly explained in *Enforcement of Charges Handbook* (Malayan Law Journal Sdn Bhd 1999); that no title or ownership passes in the case of a charge whereas in the English law concept of mortgage, the estate is conveyed by the mortgagor to the mortgagee; the mortgagor retains the right of redemption. It is only upon the mortgagor's failure to redeem that the mortgagee can foreclose. In *Janab's Key to Practical Conveyancing & Islamic Banking* by Datuk Dr Hj Hamid Sultan bin Abu Backer, the writer, relying on *Mahadevan s/o Mahalingam v Manilal & Sons (M) Sdn Bhd*, suggests that the National Land Code 'certainly recognises a mortgage in the sense of Torrens system, referred to by text writers as Torrens mortgage in which the mortgagor retains the legal ownership whilst the mortgagee acquires a statutory right to enforce his security'.

[26] Peh Swee Chin J in *Bank Bumiputera Malaysia Bhd v Doric Development Sdn Bhd & 2 Ors* [1988] 1 MLJ 462 has also described charges as being governed under statute whereas 'an English mortgage at common law was a horse of a different colour altogether'. Even Salleh Abas FJ himself expressed in an earlier decision of *Eng Ah Mooi & Ors v Overseas Chinese Banking Corporation Ltd* [1983] 1 MLJ 209 that there are differences between a

mortgage and a charge but:

> In essence both the common law mortgage and the charge under the National Land Code are legal encumbrances on the proprietary right of an owner.

[27] In other words, there is a real distinction between a mortgage and a charge, certainly for the purposes of consideration under the Limitation Act 1953. In the case of a charge, only the interest is transferred to the chargee; the ownership remains with the chargor. In the case of a mortgage, both the interest and ownership are with the mortgagee and the mortgagor only has a right to redeem the land back upon full payment. In the case of a charge, under s 243 of the National Land Code, the charge merely renders the land in question liable as security. When there is a default, there is no automatic power of sale or foreclosure; legal proceedings under both the National Land Code and the Rules of Court 2012 have to be initiated to sell the charged property. The provisions of the National Land Code are designed to allow a chargee, 'who is not the registered proprietor (unlike the mortgagee) of the subject property, to sell the land of the chargor and be the conduit for the passing of good title to the purchaser who buys under the sale ordered under s 256' — see *Judith Sihombing in National Land Code — A Commentary* (2nd Ed) p 564.

[28] From the above elucidation on the differences between a mortgage and a charge, an action to exercise the statutory remedy for an order for sale or a judicial sale is actually not an action to foreclose. But, for too long a time now, it has been frequently referred to as an action to foreclose under O 83 of the Rules of Court 2012. Regardless, such an action for an order of judicial sale falls within the terms of s 21(1). In *Hussain v Chanda Singh* [1935] 1 MLJ 262, a case though concerning chattels (cattle) is nevertheless of some application, the meaning of the term 'foreclosure' was discussed. The court explained that the term is 'certainly in common use, ... also in relation to the procedure for obtaining an order of sale of charged lands under the Land Code; the word has been used loosely. You have to obtain an order for sale of charged lands; ...'. After acknowledging the difference between strict foreclosure in the case of mortgaged estate and statutory foreclosure, Cussen J went on to explain that the word 'appears to me simply to mean the exercise of the right whatever form it takes the right to seizure and possession'. In the strict foreclosure action, proceedings are initiated in court by a bill of foreclosure, the result of which is the forfeiture or extinguishment of the mortgagor's right to redeem and the vesting of the estate in the mortgagee in perpetuity.

[29] Having made the above observations, nothing really turns on this distinction as we are not presented with a mortgage in the present appeal; the security is a charge. The above observations are necessarily made so as to draw attention to the careful deployment of particular terms, concepts and arrangements that exist in the market and also in the particular legislation

under consideration; that these different terms are used not without reason. When reading the particular legislation, care must be exercised as to the specific term or legal encumbrance under scrutiny; that under the Limitation Act 1953, there is a distinction between the two interests.

[30] Returning to the terms of s 21, we make the second material observation with particular focus on s 21(1). Breaking down its various components reveals that the provision envisages three contexts or types of actions in its application. The three types of actions are:

(a) any action to recover any principal sum of money which is secured by a mortgage or other charge of land or personal property;

(b) any action to enforce such a charge of land or personal property; and

(c) any action to recover proceeds of sale of land or personal property.

[31] In any of those three contexts, the action must be brought within 12 years from the date when the right to receive the money accrued. The computation of the 12 years period is necessarily by reference to the date when the right to receive the money accrued since no other date is offered under the terms of s 21(1).

[32] Further, s 21(1) applies to both land and personal property, using the two terms distinctly just as in the case of mortgage and charge since by the definition in s 2, 'personal property' does not include 'land' while land includes chattels real and immovable property. By that same definition, a charge would fall within the meaning of the term 'land' as a charge creates a legal and equitable interest in the land.

[33] Therefore, by definition and by the express conditions and circumstances specified in s 21(1), an action in relation to a charge of land will not and cannot fall within the terms of s 21(2), as it applies to *'mortgaged personal property'* that necessarily excludes land; or even under s 21(4) as the interest here is a charge and not a mortgage. With this, we regret we are unable to follow the decisions in *Peh Lai Huat v MBf Finance Bhd* and *Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and another appeal*.

[34] The Court of Appeal in *Peh Lai Huat v MBf Finance Bhd* was of the view that both s 21(1) and (2) have no application because the cause of action was the right to exercise the statutory remedy of an order for sale did not arise until the appellant had failed to remedy the default specified in the Form 16D notice issued under s 256 of the Code.

[35] With respect, we differ from that conclusion and with decision in

Jigarlal for the following reasons.

[36] As explained earlier, the specific use of particular terms in s 21 itself and as defined in s 2 of the same Act does not lend itself to a reading that charges and mortgages, and land and personal property, are one and the same for the purpose of the limitation laws.

[37] Although the Court of Appeal in *Peh Lai Huat* had expressed the view that both s 21(1) and (2) did not apply because of the nature or cause of action, that it was not an action to recover a principal sum of money secured by a charge on land, or a foreclosure of mortgaged personal property; that it was an action to exercise a statutory remedy for an order for sale, the Court of Appeal nevertheless proceeded to find that 'the originating summons was here filed on 6 April 2001, well within the 12 years period prescribed by s 21(2) of the Limitation Act'.

[38] In our view, this indicates that the Court of Appeal recognised that a cause of action, in the absence of any express provision to the contrary whether under the National Land Code or any other legislation, would always be subject to the law on limitations. This reading is consistent with the intention of the Limitation Act as can be seen from its long title; that it is 'an Act to provide for the limitation of action and arbitration'. There are, in any case, no provisions in the National Land Code to exempt the application of the Limitation Act.

[39] The action to exercise the statutory remedy of an order for sale clearly falls within the meaning of the term 'action' as used in s 21. Further, s 2 of the Limitation Act defines the term to include all suits or any other proceeding in a court of law. An action for an order for sale of land may only be made pursuant to O 83 of the Rules of Court 2012 which is specific procedural rules for charge actions.

[40] Under O 83 of the Rules of Court 2012, an action for the order for sale of land is frequently and loosely referred to as an action for the specific relief of 'foreclosure' though as we have shown earlier, it is not appropriate to use the term 'foreclosure' in relation to charge actions or actions for an order for sale. Regardless, an action or proceedings seeking an order for sale is undeniably proceedings in a court of law.

[41] The terms of O 83 of the Rules of Court 2012 confirms this reading:

ORDER 83

CHARGE ACTIONS

Application and interpretation (O 83 r 1)

(1) This Order applies to any action (whether begun by writ or originating summons) by a chargee or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for any of the following reliefs:

(a) payment of moneys secured by the charge;

(b) sale of the charged property;

(c) foreclosure;

(d) delivery of possession (whether before or after foreclosure or without foreclosure) to the chargee by the chargor or by any other person who is or is alleged to be in possession of the property;

(e) redemption;

(f) reconveyance of the property or its release from the security;

(g) delivery of possession by the chargee.

(2) In this Order, 'charge' includes a legal and an equitable charge.

(3) An action to which this Order applies is referred to in this Order as a charge action.

(4) These rules apply to charge actions subject to the following provisions of this Order.

[42] We must emphasise that the above reading and construction does not derogate from the fact that the charge action, the action to exercise a statutory remedy of sale of charged property or to enforce a charge in order to receive the money now accrued to the chargee, remains very much an action in rem with the chargee retaining the other right to sue in personam.

[43] Where a borrower defaults in repayments, the Federal Court in *Chan Boi Loi v Public Bank Bhd and another application* [2011] 1 MLJ 478; [2009] 6 CLJ 81 reiterated that 'a lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successfully to recover the money unless there is an agreement to the contrary'. In the event there is a shortfall after a public sale, the right to bring an action in personam to recover the balance outstanding is not postponed until the charged land is sold. The right of realisation of the property does not vest in the lender a new, separate and independent cause of action. The promise to pay or the right to recover for a shortfall does not affect the original promise or obligation to pay; the obligation to pay remains, just that it is now for, a lesser sum.

[44] As expressed by Lord Hershell LC in *Re McHenry McDermott v Boyd* [1894] 8 Ch 290, 'The truth is that the debt is one debt only. The second clause of the document did not create a new debt, but only prescribed what should be done in the event of realisation, and what use should be made of the money

realised. The words gave the creditor no right which would not equally have existed without them'. After all, an order for sale is not a judgment as was settled in the case of *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257:

> Here, there was no judgment debt. The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code. The appellant's claim was not under a covenant but under the registered charge.

[45] This view was affirmed by the Supreme Court in *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119:

> The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under a registered charge. The order for sale when made under s 256 of the Code is not a judgment or a decree. The Court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are called from several decisions of our courts which have correctly stated the law upon the subject.

See also Federal Court decisions in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; and *CIMB Investment Bank Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd* [2014] 6 MLJ 779; [2014] 9 CLJ 1012.

[46] Where the action is to recover proceeds of sale of land or personal property, the Federal Court's deliberations in the case of *Tan Kong Min v Malaysian Nasional Insurance Sdn Bhd* [2006] 1 MLJ 601; [2005] 3 CLJ 825 are relevant. There, the Federal Court had occasion to deal with the interpretation and application of s 21 of the Limitation Act 1953. In that case, the appellant was granted a housing loan by the respondent. By way of security, a first legal charge was created over the appellant's land in favour of the respondent. The appellant defaulted in his repayments and the respondent exercised their statutory rights and 'foreclosed' on the land by way of a public auction. There was a shortfall from the auction and so, pursuant to cl 7 of the Annexure to the charge, the respondent demanded payment of the difference between the amount due and the amount realised from the sale together with interest. There was a failure to pay and the respondent sued. The claim was dismissed at first instance but allowed on appeal.

[47] At the Federal Court, the principal question was whether the claim for the balance after the sale was a claim for money secured by a charge on land and

therefore subject to the limitation period of 12 years under s 21(1) of the Limitation Act; or, was it still a claim founded on contract and thereby subject to the limitation of six years under s 6(1)(a) of the Act.

[48] The Federal Court held that by virtue of s 6(5), s 6 does not apply as the action was to recover money secured by, inter alia, a charge on land. The Federal Court concluded that the action was to recover money secured by a charge. Such an action is an action in personam to which s 21(1) applies whereas s 21(2) specifically refers to a foreclosure action in respect of mortgaged personal property which is an action in rem. In both cases, the limitation period is 12 years, from the date when the right to receive the money accrued or the right to foreclose accrued, as the case may be.

[49] Where the action is to recover the balance money, the ensuing question is when does the cause of action with regard the personal liability of the chargor arise or deemed to have accrued. In answering this poser, the Federal Court reviewed the relevant authorities of *Lim Kean v Choo Koon* [1970] 1 MLJ 158 and *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409; [1991] 2 CLJ 871 before concluding that:

> In the circumstances of the present appeal before us, we are of the view that the point in time where all the material facts are said to be in existence to render the cause of action complete would be after the sale has been conducted and the differential amount remaining due to the respondent has been ascertained.

[50] The Federal Court found that on the facts, the earliest possible date that the respondent could sue the appellant for breach of his personal covenant would be the date the property was sold by auction. For purposes of considering when the period of limitation commences, the Federal Court held that it was when the appellant failed to settle the difference when required to do so by the respondent's letter of demand. The limitation period runs from the expiry of the time specified for payment. The Federal Court rejected the argument that time ran from the time the appellant first defaulted. According to the Federal Court —

> ... this would mean that the respondent should have proceeded by way of a civil suit (when the appellant defaulted in repayment of his housing loan) concurrently with realising the security under the charge in order to avoid the danger of being caught by limitation, instead of realising the security under the charge first and upon the sale being concluded, to institute a separate action to recover the insufficient amount from the chargor personally as being done here ...

[51] Having explained our above concerns, we return now to s 21 of the Limitation Act and to the three types of action which are envisaged under s 21(1). The facts in the present appeal do not concern a recovery of the principal sum of money which is secured by a charge or even an action to

recover proceeds of sale of land or even the balance sum after a sale. It is an action to enforce a charge of land with the single purpose of receiving money which has accrued. Such an action falls, quite clearly, within the terms of s 21(1).

[52] What then is the relevance or implication of s 21 of the Limitation Act on and its co-relation with O 83 of the Rules of Court 2012 and s 256 of the National Land Code?

[53] In order to enforce a charge, two steps are mandatory: compliance with the requirements of s 256 of the National Land Code; and compliance with the requirements of O 83 of the Rules of Court 2012. In this regard, the authorities have been consistently clear that compliance of the various requirements is strict, that an order for sale will not be allowed where there is non-compliance of in particular rr 3(6) and 3(3) of O 83 of the Rules of Court 2012 concerning the amount of the repayments and the amount of instalments in arrears, that these matters must be clearly stated. See: *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283; and *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608, the latter approved by the Supreme Court in *Maimunah bte Megat Montak v Mayban Finance Bhd* [1996] 2 MLJ 422; both cases discussed by the Court of Appeal in *Lum Choon Realty v Perwira Habib Bank Malaysia Bhd* [2003] 4 MLJ 409 at p 431.

[54] However, it cannot be denied that without attending to the notice requirements specified under s 256 of the National Land Code, there cannot be any proceedings or action under O 83. We are of the view that like O 83 of the Rules of Court 2012, Chapter 3 of the National Land Code and in particular, s 256, deal with the procedural details that must be attended to before the separate right to enforce an in rem action to realise or foreclose on the charge can be validly affected.

[55] Part 16 of the National Land Code regulates charges and liens. It has five Chapters: Chapter 1 deals with the creation of charges and liens, Chapter 2 contains the implied provisions; Chapters 3 and 4 deal with the respective remedies of sale and possession while Chapter 5 deals with the matter of discharge or redemption. Section 249 statutorily implies certain agreements into all charges:

> 249 Agreements by chargor implied in all charges.
>
> (1) In every charge created under this Act, there shall be implied on the part of the chargor —
>
> (a) an agreement that he will comply with the provisions thereof as to payment of the sum or sums thereby secured, and with any provision for the payment of interest thereon, if any; and

(b) an additional agreement in the terms set out in subsection (2) or (3), according as the subject-matter of the charge is land or a lease.

(2) The additional agreement by the chargor in the case of a charge of land shall be an agreement that he will during the continuance of the charge —

(a) pay all rent falling due to the state authority in respect of the land, and all rates, taxes and other outgoings relating thereto, and

(b) duly observe and perform all conditions, express or implied, to which the land is subject.

(3) The additional agreement by the chargor in the case of a charge of any lease shall be an agreement that he will during the continuance of the charge pay the rent reserved by the lease, and duly observe and perform all other provisions thereof, express or implied.

[56] Sections 250 and 251 further imply, in the absence of express provisions to the contrary, certain provisions into all charges.

[57] Where there is a breach of either the express or the implied agreements of the charge, Chapters 3 and 4 provide for the remedies of sale and possession. Chapter 3 is of concern and it is set out as follows:

Chapter 3

Remedies of Charges: Sale

Introductory

253 Purpose and scope of this Chapter:

(1) The provisions of this Chapter shall have effect for the purpose of enabling any chargee to obtain the sale of the land or lease to which this charge relates in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein.

(2) The powers conferred by this Chapter shall be additional to those conferred by Chapter 4, and no chargee shall be debarred from exercising them by reason of the facts that he has already taken action under that Chapter.

(3) In this Chapter —
'bidder' means only one natural person, one corporation or one single body and does not include the chargor;
'chargee' includes a financial institution;
'financial institution' means any licensed bank, licensed finance company or licensed merchant bank as defined in the Banking and Financial Institutions Act 1989, any co-operative society carrying on the business of financing and any statutory body established under any Federal or State law acting as chargee under this Act; and
'purchaser' means the successful bidder.

(4) For the purposes of this Chapter, the chargor or chargee may appoint any person or body to perform his duties or take action on his behalf and notice of any such appointment shall be given in writing to the registrar of the court or the land administrator, as the case may be.

Notice Before Sale

254 Service of default notice, and effect thereof.

(1) Where, in the case of any charge, any such breach of agreements as is mentioned in sub-section (1) of section 253 has been continued for a period of at least one month or such alternative period as may be specified in the charge, the chargee may serve on the chargor a notice in Form 16D —

(a) specifying the breach in question;

(b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and

(c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.

(2) Where, after the service of any such notice, the charged land or lease becomes vested in any other person or body, the notice shall be as valid and effectual against that person or body as it was against the person or body on whom it was served.

(3) If at the expiry of the period specified in any such notice the breach in question has not been remedied —

(a) the whole sum secured by the charge shall (if it has not already done so) become due and payable to the chargee; and

(b) the chargee may apply for an order for sale in accordance with the following provisions of this Chapter:

Provided that paragraph (a) shall not apply to any charge to secure the payment of an annuity or other periodic sum.

255 Special provision with respect to sums payable on demand.

(1) Where the principal sum secured by any charge is payable by the chargor on demand, the chargee may make the demand by a notice in Form 16E, and in that event, if the sum in question is not paid to him within one month of the date on which the notice is served, may apply forthwith for an order for sale without being required to serve a notice in Form 16D under sub-section (1) of section 254.

(2) The provisions of sub-section (2) of section 254 shall apply to notices in Form 16E as they apply to notices in Form 16D.

Procedure — Registry Title, Qualified Title Corresponding Thereto, And Subsidiary Title

256 Application to Court for order for sale.

(1) This section applies to land held under —

(a) Registry title;

(b) the form of qualified title corresponding to Registry title; or

(c) subsidiary title,
and to the whole of any divided share in, or any lease of, any such land.

(2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provision in that behalf of any law for the time being in force relating to civil procedure.

(3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

[58] It is evident from s 254, reinforced by s 253, that in the event the chargor breaches any of the express or implied agreements, the chargee has the right to obtain an order for the sale of the charged land. That order of sale is granted by the High Court under s 256(2) and (3) read together with O 83 of the Rules of Court 2012, O 83 being the law relating to civil procedure for the time being in force. Before the application may be properly undertaken, a notice in Form 16D must be issued pursuant to s 254. The notice is intended to first indirectly remind the chargor of his obligations by pointing out the specific breach; telling the chargor to remedy the breach within the time period specified in the notice; before finally warning the chargor that if the notice is not complied with, proceedings to obtain an order for sale will be sought. Where the chargor does not heed the requirements in the notice, the chargee is then entitled to apply to court for the order for sale under s 256.

[59] The above sets out the mechanism or the process that must be followed before the chargor may apply to the court for an order for sale of the charged property. But, insofar as how long has the chargor got before the chargor may get round to enforcing that right to seek an order for sale is concerned, the provisions of the Limitation Act 1953 will have to be considered. According to the decisions in *Peh Lai Huat v MBf Finance Bhd* and *Jigarlal K Doshi @ Jigarlal a/l Kantilal v Resolution Alliance Sdn Bhd and another appeal*, s 21(2) operates only from when the chargor fails to remedy the default or breach as specified in the Form 16D notice.

[60] With respect, aside from the reasons already pointed out, including the fact that s 21(2) applies to 'mortgaged personal property' which necessarily excludes land, which is the case here; that the proper and applicable provision is s 21(1), the right to enforce a charge must be taken within 12 years calculated not from when the right to seek an order for sale accrued, but from when the

right to receive the money accrued, as are the clear terms of s 21(1). The question that now emerges is when does the right to receive the money accrued arise? That question is both a necessary and appropriate question to pose in the light of the law of limitations on the right of action. The Federal Court decision in *Nasri v Mesah* [1971] 1 MLJ 32 is that a right to sue would depend on when the cause of action arose. This view was followed in *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749; [2014] 1 CLJ 207.

[61] In *Nasri v Mesah,* the Federal Court was clear that 'a cause of action arises when at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought'. The Federal Court was of the further view that the 'expressions 'the right to sue accrues', 'the cause of action accrues': and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run'.

[62] It is a statutorily implied term prescribed under s 249(1)(a) of the National Land Code that the chargor has agreed that 'he will comply with the provisions thereof as to payment of the sum or sums thereby secured, and with any provision for the payment of interest thereon, if any'. Where the chargor breaches that agreement to pay the sum secured by the charge, the chargee correspondingly is deprived of its right to receive the money accrued. It is at this point that the right to enforce the charge arises and the right to sue or the cause of action accrues.

[63] However, before the chargee may proceed to enforce its right in relation to the charge, the chargee is required to comply with the provisions under the National Land Code. Here, the additional safeguards provided under Part 16 requires the breach of the express or implied agreement must have 'continued for a period of at least one month or such alternative period as may be specified in the charge' before the efforts towards enforcing that charge can take place. The object of this notice was expressed by the Federal Court in *Jacob v Overseas Banking Corporation Ipoh* [1974] 2 MLJ 161:

> ... was to see that sufficient notice was given to the chargor before the chargee applied for an order of sale and in this case the chargee had given the chargor sufficient notice before coming to the court.

[64] The provision granting the right to sell charged land is in s 254 of the National Land Code, facilitated by the procedural rules in O 83 of the Rules of Court 2012. The 12 years period commences a month after the breach or after the chargor has been deprived of the right to receive the money accruing under the charge. This period does not alter the underlying contractual relationship between the parties. The in rem right over the subject land is conferred by

reason of the contractual agreement between the parties and that right is fortified in law in that it is recognised as a valid registrable encumbrance over the subject land. Without the underlying contractual relationship, and absent of any breach, the chargee not only cannot but has no right to approach the Court under the terms of the National Land Code and O 83 of the Rules of Court 2012 for an exercise of the statutory right of sale. The right to pursue this statutory remedy is triggered by an event of breach or default in the underlying contractual agreement and in the terms of the charge — see Federal Court decision in *S & M Jewellery Trading Sdn Bhd v Fui Lian-Kwong Hing Sdn Bhd* [2015] 5 MLJ 717.

[65] If the time period of 12 years runs only from when the chargee decides to issue the Form 16D notice and then only after the failure to remedy the default, as is suggested in the case of *Peh Lai Huat* and *Jigarlal,* the time requirements of 'at least one month or such other alternative period as may be specified in the charge' mentioned in s 253, would have been rendered meaningless and of no effect. If the time period of 12 years does not run from when the breach of the agreement took place whence the right to receive money accrued has been disaffected, a chargee may well decide not to do anything for the next 100 years, and still be in time to enforce the ad rem right of order of sale.

[66] The laws of limitation are intended to protect the rights of all parties concerned. These laws lend certainty and confidence to the enforcement and safeguarding of rights and remedies and recourse to the courts, preventing abuse through the principle of laches. This was discussed in the Supreme Court decision in *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409; [1991] 2 CLJ 871:

> The doctrine of limitation is said to be based on two broad considerations. Firstly, there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.

[67] The Supreme Court further opined that the laws on limitation are 'promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest reipublicae ut sit finis litum that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts'.

[68] On the facts, the above view has been fortified by the express terms of agreement as found in both the loan agreement and in the charge. Clauses 9, 10 and 11 of the charge presentation are relevant and read as follows:

> 9.1 If the Chargor fails to perform or observe any covenant or condition in its part

contained in this charge, it shall be lawful for but not obligatory upon the Bank in order to make good such failure in whole or in part and at the Chargor's cost:

(a) to enter upon the said Land with or without workmen and effect such repairs and other works thereon as the Bank considers necessary;

(b) to take such steps, give such notices, execute such works and do such things as the Bank considers necessary to comply with any requirements of or any notice, order or direction, permission or proposal, given, served or made under the National Land Code or any other written law or otherwise affecting or likely to affect the said land or its value;

(c) to admit, settle, liquidate, compound or contest in such manner as the Bank thinks fit any claim or liabilities in relation to the said Land whether or not the Bank is expressly indemnified in this Charge against the same;

(d) to make at the expense of the Chargor such payments and expend or debit in account such monies as the Bank considers necessary.

[69] Clause 10 of the annexure to the charge presentation deals with events of default:

10.1 If any of the events specified as an event of default in the Loan Agreement and/or any of the following events shall occur, then the whole for the Secured Labilities shall become immediately due and payable at any time on demand by the Bank and the Bank shall cease to be under any further obligation to the Borrower or Chargor:

(a) the Borrower or Chargor fails to pay any part of the Secured Liabilities when due; or

(b) the Chargor ...

(c) ...

(d)

[70] Clause 10.4 further provides that in the event of any breach by the appellant/chargor of any of the agreements, it shall be lawful for the respondent bank to forthwith to give notice to the chargor requiring the chargor to remedy the said breach within a period of not less than one month and/or any other period allowed for by law. This provision is consistent with s 254 and it does not seek to extend the period beyond the statutory minimum of one month. Further, there is cl 11, which deals with enforcement, providing that in the event of any default, the respondent shall be entitled to exercise such rights as the respondent bank may have under the Security documents. That includes clearly the right to enter and take possession of the land, and the right and power to sell the charged land.

[71] In the present case, the terms of the charge presentation are consistent with the terms secured under s 254 of the National Land Code. The event of

default is the breach which occurred on 12 May 2003 when the appellant failed to service the repayments. The law of limitation set in on 12 May 2015. On the facts of this case, it is not disputed that the bank filed the originating summons seeking an order for sale on 8 August 2016. By this time, the action is clearly barred under s 21(1) of the Limitation Act 1953.

[72] Going back then to the question that we first posed to the parties, whether s 256 of the National Land Code is substantive or procedural law, we find that this provision must be read together with the other provisions in Part 16 of the National Land Code. And, in so doing, we will find that s 256 is part of adjectival remedial law as is evident from s 253, that states:

> The provisions of this Chapter shall have effect for the purpose of *enabling any chargee to obtain the sale of the land* or lease to which this charge relates in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein. (Emphasis added.)

[73] Mohd Zawawi Salleh J (as he then was) in *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and anor suit* [2011] MLJU 925; [2012] 3 CLJ 249 had to deal with the issue of whether ss 56 and 57 of the Central Bank of Malaysia Act 2009 ('Act 701') applied retrospectively. His Lordship felt it apt to deal with that issue in the context of whether these provisions were procedural or substantive in nature and his Lordship relied on the *Law Commission of India, 193 Report* which explained as follows:

> 'Procedural law' is one which deals with the procedure in courts which has to be followed by the parties to seek vindication of their rights. The rights which they seek to vindicate in the court through the said procedure are the substantive rights ...

[74] The definitions of the term 'substantive law' as opposed to 'adjectival or procedural law', which are found in the law dictionaries are of assistance:

The Advanced Law Lexicon by P Ramanatha Aiyar:

> That part of law which creates and defines rights; not adjective law, which defines methods of enforcing rights.

Black's Law Dictionary (6th Ed) at p 1429 as cited in *Sia Kim Yoke v Public Prosecutor* [1998] 5 MLJ 658 at p 665:

> That part of law which creates, defines, and regulates rights and duties of parties, as opposed to 'adjective, procedural, or remedial law,' which prescribes method of enforcing the rights or obtaining redress for their invasion: *Allen v Fisher* 574 P 2d 1314. The basic law of rights and duties (contract law, criminal law, tort law, law of wills etc) as opposed to procedural law (law of pleading, law of evidence, law of jurisdiction, etc).

[75] The Federal Court in *R Rama Chandran v The Industrial Court of*

Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147 made a similar but firm observation on the distinction between these two terms, 'substantive' and 'procedural' laws when discussing the position of s 17(1) of the Courts of Judicature Act 1964:

> The *most decisive limitation* placed on the powers of the Rules Committee, and indeed on other rule-making authorities, is that they extend to regulating the *'practice and procedure'* of the High Court and other courts for which the Rules are made. Although these powers are wide, yet it cannot be gainsaid, that they do not extend into the area of *substantive law.* Clearly, there is a *vital distinction* made between on the one hand, substantive law, the function of which is to define, create, confer or impose legal rights and duties, and on the other hand, procedural law, the function of which is to provide the machinery, the manner or means, by recourse to which legal rights and duties may be enforced or recognised by courts of law or any other tribunal seized with jurisdiction to adjudicate on a dispute before it.

[76] Clearly, the statutory provisions have to create, provide or define some right in order to be considered substantive law. It is our respectful view that the terms of s 256 do not meet that criterion. In the first place, Chapter 3 of the National Land Code itself describes the provisions in this chapter as containing the provisions on the remedy of a sale in respect of charges. And, s 253 fortifies that intent when it states that the 'Purpose and scope of this Chapter' is 'to have effect for the *purpose of enabling* any chargee to obtain the sale of the land or lease to which this charge relates *in the event of a breach* by the chargor *of any of the agreements on his part expressed or implied* therein'.

[77] Sections 254–256 provide for the procedure, method, mechanism, manner or means of enforcing the right for an order of sale. However, the substantive right of the chargee to approach the court for the remedy of an order for sale of the charged land is still dependent on there being a breach of the express or implied agreements. The express agreements are to be found in the charge documents, while the implied agreements are as provided under s 249 of the National Land Code. As expounded by the Federal Court in *S & M Jewellery Trading Sdn Bhd v Fui Lian-Kwong Hing Sdn Bhd*, the right to pursue the statutory remedy of sale is triggered by the event of breach or default in the underlying contractual agreement and in the terms of the charge.

[78] Since s 253 clearly refers to a breach which already exists, and that it is this breach which triggers the right of action or cause of action in favour of the chargee bank to enforce the charge, activating the mechanism under the National Land Code cannot mean that the breach which allowed the chargee bank to invoke the mechanism in the first place is avoided. Section 256 merely affords the chargor the opportunity to remedy the breach before the application for an order of judicial sale may be sought. Once that breach has been remedied, the breach or default ceases and the chargee bank may no longer approach the court for an order of sale. As mentioned earlier, the Federal

Court had decided in *Jacob* that the Form 16D Notice is to give the charger sufficient notice before the chargee bank can go to court for an order of sale.

[79] We find further support for this in the view of learned author Judith Sihombing in *National Land Code: A Commentary (2nd Ed)* at p 566:

> The power of sale can be exercised on the breach of any covenant, not only on the breach of the covenant to pay. Thus, breach, of any agreement implied into the charge under ss 249 to 251 or any express agreements inserted by the parties, will give rise to the right to seek exercise of the power of sale.

[80] In our view, the fact that s 256(2) expressly provides that the application for sale shall be dealt with in accordance with the provisions of any law relating to civil procedure for the sale of land which is for the time being in force, and O 83 is that specific procedural law for the purpose of charges, foreclosures and for sale of land, does not alter the status of s 256 as procedural law in effect. This provision merely provides for the manner and the authority which has been vested with the power to make that order for sale.

[81] We are convinced that the appeal is therefore with merit and the appeal is consequently allowed. The foreclosure action is clearly time- barred in which case, the appellant has shown that there is cause to the contrary as to why the order for sale is bad in law and cannot be ordered. The order of the High Court is hereby set aside.

[82] We have also since been alerted to the decision of the Federal Court in *Wong Kok Leong & Anor v RHB Bank Berhad* [2015] 2 MLJ 385, and we have also invited the parties to further submit on the relevance or application, if any of this decision. The parties have since made further submissions; and having considered those submissions, we are of the view that the decision in *Wong Kok Leong* does not apply in the present appeal. That appeal concerns a lien holder's caveat and the operation of ss 281 and 331 of the National Land Code while the present appeal is on entirely different considerations.

[83] On the alternative argument, we are of the view that the issue of acknowledgment cannot arise because of the terms of s 254 of the National Land Code which looks to the time when the right to receive the money accrued.

[84] In any event, we find the principles in this respect are not met. In order to constitute as an acknowledgment within the terms of s 26 read with s 27 of the Limitation Act 1953 and thereby render a fresh accrual of action, there must be an unequivocal admission that there is a debt or other liquidated amount outstanding and unpaid at the time of the acknowledgment. This principle has been well settled by the Federal Court in *Wee Tiang Teng v Ong*

Chong Hooi & Anor [1978] 2 MLJ 54, applying the principles set down in *Good v Parry* [1963] 2 All ER 59 and the Privy Council decision in *Consolidated Agencies Ltd v Bertram Ltd* [1965] AC 470.

[85] We agree with the learned counsel for the appellant that time, for the purpose of limitation, is not enlarged by the letter sent by Tamel Selvam a/l Savarimuthu on 13 July 2015. He is the co-borrower of the loan. His letter does not in law amount to an acknowledgement under s 26 read with s 27 of the Limitation Act 1953. It relates to the debt which is an action in personam and not to the title of the respondent bank, which would then have enabled it to be construed as an acknowledgement of title. There is also no acknowledgement of the debt; it is an appeal against the interest imposed.

[86] We are amply satisfied that the appellant has discharged the burden of proof in showing that the law of limitations apply in the particular facts of this case *(WTK Holdings Bhd v Foo Sae Heng & Anor* [2011] 5 CLJ 437) and that consequently cause to the contrary has been successfully established to warrant a refusal of the order for sale — *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77. Evidently, the learned judge has plainly erred in his deliberations and such error warrants appellate intervention by us.

[87] Therefore premised on the above, we allow this appeal with costs.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor